

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

OPAL HARGER, *et al.*

Plaintiffs,

V.

U.S. DEPARTMENT OF LABOR,
and THE NATIONAL INSTITUTE
OF OCCUPATIONAL SAFETY
AND HEALTH,

Defendants.

NO. CV-06-5071-RHW

ORDER GRANTING MOTIONS FOR JOINDER, DENYING IN PART, GRANTING IN PART DEFENDANTS' MOTION TO DISMISS

Before the Court are Defendants' Motion to Dismiss (Ct. Rec. 21) and Plaintiffs' Motions for Joinder (Ct. Recs. 39 & 44). A hearing was held on April 24, 2007. Tom Foulds appeared on behalf of Plaintiffs; Assistant United States Attorney Rolf Tangvald appeared on behalf of Defendants. The Court orally ruled on these motions, and this Order memorializes the Court's oral rulings.

A. Plaintiffs' Motions for Joinder

Plaintiffs ask this Court to join Thelma Bischoff, as surviving spouse and personal representative of Warren Bischoff (Ct. Rec. 39), and Marvin B. Schack, as surviving son and personal representative of former Hanford worker Marvin H. Schack (Ct. Rec. 44), to their claims. Ms. Bischoff's and Mr. Schack's claims present the same legal and factual questions that were prevalent in Plaintiffs' previously-granted motions for joinder. (Ct. Recs. 34 & 43). Therefore, Plaintiff's Motions for Joinder are granted.

**ORDER GRANTING MOTIONS FOR JOINDER, DENYING IN PART,
GRANTING IN PART DEFENDANTS' MOTION TO DISMISS * 1**

1 **B. Defendants' Motion to Dismiss**

2 The Government moves to dismiss Plaintiff Opal Harger's complaint based
 3 on lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a
 4 claim upon which relief can be granted pursuant to Rule 12(b)(6).

5 **1. Statutory Background of EEOICPA**

6 In 2000, Congress passed the Energy Employees Occupational Illness
 7 Compensation Program Act of 2000 (EEOICPA or "Act"), 42 U.S.C. § 7384, *et*
 8 *seq.* The EEOICPA establishes a compensation program providing benefits to
 9 individuals with illnesses caused by exposure to radiation and other toxic
 10 substances in the course of their work related to the nuclear weapon production
 11 and testing programs of the U.S. Department of Energy (DOE) or its predecessor
 12 agencies. 42 U.S.C. § 7384. Section 7384s provides that "a covered employee, or
 13 survivor of that covered employee if the employee is deceased, shall receive
 14 compensation for the disability or death of that employee from that employee's
 15 occupational illness in the amount of \$150,000." 42 U.S.C. § 7384s(a)(1).

16 An individual is entitled to benefits under the EEOICPA if the claim is for
 17 radiogenic cancer that is "at least as likely as not related to the employment at the
 18 DOE facility." 20 C.F.R. § 30.210.¹ To determine if the claimant's radiogenic
 19 cancer is at least as likely as not related to his or her employment at a DOE
 20 facility, the DOL will forward the claimant's information to NIOSH² for a dose
 21 reconstruction. A dose reconstruction occurs when the DOL cannot determine the
 22 amount of radiation the employee absorbed while employed. *See* 42 U.S.C. §

24 ¹ 20 C.F.R. § 30.210 provides numerous other facts that must be established
 25 by the plaintiff to receive \$150,000. However, none of these other facts appear to
 26 be in dispute.

27 ² In this case, NIOSH has subcontracted this duty to Oak Ridge Associated
 28 Universities Team (ORAUT).

**ORDER GRANTING MOTIONS FOR JOINDER, DENYING IN PART,
 GRANTING IN PART DEFENDANTS' MOTION TO DISMISS * 2**

1 7384n(d). The basic principal of dose reconstruction is to characterize the
2 radiation exposure of the affected employee, and then translate that exposure into
3 quantified doses to specific body organs or tissues. 42 C.F.R. § 82.2. In
4 reconstructing radiation exposure, the NIOSH utilizes: (1) personal information
5 such as age, gender, and biological information from testing; (2) employment data;
6 (3) co-worker data from workplace monitoring; (4) workplace characterization
7 data; (5) individual monitoring data; and (6) descriptions of the type of work
8 performed at the work location. 42 C.F.R. § 82.14.

9 NIOSH also relies on the Technical Basis Documents³ to formulate a dose
10 reconstruction. (Ct. Rec. 3). These Technical Basis Documents provide a
11 comprehensive analysis of the exposure conditions that employees may have
12 encountered at Hanford along with various tables and conversion factors to be
13 utilized in calculating doses. The Technical Basis Documents can be divided into
14 at least three categories: (1) Occupational External Dosimetry; (2) Occupational
15 Environment Dose; and (3) Occupational Internal Dose. The Occupational
16 External Dosimetry at least partly relates to the neutron exposure to employees
17 working at nuclear facilities. The Occupational Environment Dose is at least
18 partly concerned with the exposure of employees to radionuclides (*e.g.*, plutonium,
19 strontium-90). The Occupation Internal Dose at least partly relates to an
20 employee's internal exposure based on urinalysis.

21 Upon reconstruction of the employee's radiation dose, NIOSH will forward
22 a final dose reconstruction report to the DOL. The DOL will then enter the dose
23 reconstruction into NIOSH-IREP, a special computer program designed to
24 calculate the Probability of Causation that the cancer was caused by the
25 employee's employment. If the Probability of Causation is greater than 50

27 ³ In her complaint, Harger asserts that the authors of the Technical Basis
28 Documents have a conflict of interest. (Ct. Rec. 3).

1 percent, then the claimant will receive the \$150,000 compensation. *See* 42 §
 2 7384n(b). If the Probability of Causation is less than 50 percent, then the claimant
 3 will not receive the \$150,000 compensation. *See id.*

4 **2. Facts Regarding Opal Harger**

5 Plaintiff Opal Harger worked continuously for 33 years as a laboratory
 6 technician testing radioactive samples and materials at Hanford from February
 7 1948 through August 1981. Late in her life, Harger was diagnosed with
 8 infiltrating ductal carcinoma, a form of breast cancer. On September 26, 2001, at
 9 the age of 80, Harger filed a complaint with the DOL seeking compensation under
 10 the EEOICPA. The complaint included dates of employment along with medical
 11 and pathological reports confirming the diagnosis of a covered cancer. After an
 12 eight-month delay, the DOL forwarded Harger's employment information to
 13 NIOSH for a dose reconstruction.

14 On May 9, 2003, one year after the DOL forwarded the claim to NIOSH,
 15 NIOSH conducted a telephone interview with Harger. On April 15, 2005, about
 16 three years after the DOL forwarded Harger's employment history to NIOSH,
 17 NIOSH completed the dose reconstruction and sent it to the DOL. NIOSH
 18 estimated the dose reconstruction at 40.723 rem. The DOL determined that
 19 Harger's Probability of Causation was 42.36 percent. Therefore, on May 19,
 20 2005, the DOL denied Harger's claim.

21 Harger timely filed numerous objections with the DOL's Final Adjudication
 22 Branch (FAB) and requested an oral hearing. An oral hearing regarding Harger's
 23 objections was conducted on October 13, 2005. On April 18, 2006, the DOL
 24 issued a denial of Harger's objections, calling this its final decision. Harger filed a
 25 request for reconsideration which was subsequently denied on August 7, 2006.
 26 Harger then filed a complaint with this Court alleging numerous due process and
 27 EEOICPA violations. Harger alleges that: (1) due process was denied because
 28 there are no DOL procedures available to challenge the dose reconstruction

**ORDER GRANTING MOTIONS FOR JOINDER, DENYING IN PART,
 GRANTING IN PART DEFENDANTS' MOTION TO DISMISS * 4**

1 methodology; (2) the DOL failed to provide dose experts to assist Harger; and (3)
 2 the DOL refused to disclose to Harger the NIOSH comments and rebuttal to
 3 Harger's evidence—in other words, they held an *ex parte* hearing in violation of
 4 the APA.

5 Further, Harger alleges that her dose reconstruction is faulty. Specifically,
 6 Harger alleges that the Technical Basis Documents are incorrect because: (1) the
 7 Documents failed to take into consideration site specific data such as (a) massive
 8 particle releases of radionuclides and (b) ingestion hazards; (2) the radionuclide
 9 exposure estimates were based on unreliable stack monitoring measurements; (3)
 10 the neutron exposure estimates are unreliable due to (a) corrupt data⁴ and (b) poor
 11 measuring techniques; and (4) the internal exposures estimates by urinalyses are
 12 based on incorrect solubility factors. (Ct. Rec. 3).⁵ Therefore, Harger concludes
 13 that her dose reconstruction—which is largely based on the Technical Basis
 14 Documents—is incorrect.

15 On November 9, 2006, after filing the present suit in this Court, the DOL's
 16 Office of Workers' Compensation Programs' Director for the Division of Energy
 17 Employees Occupational Illness Compensation vacated the final order denying
 18 Ms. Harger's claim. The Director found the August 7, 2006, decision did not
 19 adequately address the objections raised by Ms. Harger in her request for
 20 reconsideration. This order vacated both the August 7 and the April 18, 2006,
 21 decisions and remanded the matter to the Office of Workers' Compensation
 22 Programs for further development. That Office referred Ms. Harger's claim back
 23

24 ⁴ The company that performed these measurements was fired for fraud.

25 ⁵ It appears Ms. Harger is alleging that the scientific methodology selected
 26 by the DOL is arbitrary and capacious. *See Earth Island Institute v. U.S. Forest*
27 Service, 442 F.3d 1147, 1160 (9th Cir. 2006) (agency's scientific methodology
 28 reviewed by the trial court under an arbitrary and capricious standard).

**ORDER GRANTING MOTIONS FOR JOINDER, DENYING IN PART,
 GRANTING IN PART DEFENDANTS' MOTION TO DISMISS * 5**

1 to NIOSH for consideration of the issues she raised and for a new dose
 2 reconstruction.⁶ The Director's Order is the primary basis for Defendants' current
 3 motion for dismissal. At the hearing, the parties also informed the Court that
 4 several of the other Plaintiffs' final orders will also be vacated for reconsideration.
 5 However, the Government assured Plaintiffs' counsel and the Court that Plaintiff
 6 Theresa Alston's case will not be reopened by the Director.⁷

7 **3. Discussion**

8 Ms. Harger raises several claims in her Complaint, and she names both the
 9 DOL and NIOSH as Defendants. Aside from her claims related to due process
 10 concerns (challenging the NIOSH's methodology in performing the dose
 11 reconstruction, adjudicating her EEOICPA claim, reconstructing her radiation
 12 dose), Ms. Harger requests the Court to enforce requests allegedly made by her
 13 under the Freedom of Information Act (FOIA) to both DOL and NIOSH.

14 **a. Due Process Claims**

15 Defendants assert Plaintiff Harger's due process claims against DOL and
 16 NIOSH should be dismissed because there is no "final agency action" on her
 17 claim, thus leaving no basis for review under the Administrative Procedure Act
 18 (APA). They submit the Director's Order vacating the final decision has rendered
 19 moot Ms. Harger's request that the Court set aside that decision, and, to the extent
 20 the Court may have jurisdiction to consider Ms. Harger's due process challenge
 21 independent of the APA, such a challenge is not ripe in the absence of a
 22 formalized administrative decision by DOL. Additionally, Defendants argue the
 23 Court lacks subject matter jurisdiction to review NIOSH's dose reconstruction

24
 25 ⁶ The Director's Order also requires a new recommended decision with the
 26 same administrative review rights afforded by the original decision.

27 ⁷ Defense counsel also stated he was not sure whether Plaintiff Judy
 28 Hengen's final order would also be reopened.

1 because the dose reconstruction also is not a final agency action, nor is it ripe for
 2 decision because NIOSH is currently re-calculating Ms. Harger's dose
 3 reconstruction. As an alternative to dismissal, Defendants ask the Court to hold
 4 this matter in abeyance pending the completion of a new dose reconstruction and
 5 the issuance of a new final decision on Ms. Harger's entitlement to EEOICPA
 6 benefits.

7 Plaintiffs' counsel is rightfully concerned about any delay in this case,
 8 particularly considering the advanced age of several Plaintiffs. However, the
 9 Court is unwilling and unable to consider a decision that is not "final." The
 10 regulations associated with the EEOICPA permit the Director "[a]t any time after
 11 the FAB has issued a final decision" to vacate, reopen, and remand that decision to
 12 the FAB "without regard to whether new evidence or information is presented or
 13 obtained[.]" 20 C.F.R. § 30.320(a). This decision "is solely within the discretion
 14 of the Director for Energy Employees Occupational Illness Compensation and is
 15 not reviewable." 20 C.F.R. § 30.320(c). The resulting new decision "will be
 16 subject to the adjudicatory process" described in the regulations. *Id.* Therefore,
 17 the Director acted well within his discretion in remanding the decision denying
 18 Ms. Harger EEOICPA benefits. In spite of the decision to reopen Ms. Harger's
 19 and others' "final decisions," they will once again become "final" at the latest one
 20 year after the Director's decision.⁸

21 The Court shall permit the process at the NIOSH and DOL to come to its
 22

23 ⁸ "Any recommended decision . . . that is pending . . . for more than one year
 24 from . . . the date the Director reopened the claim for issuance of a new final
 25 decision pursuant to § 30.320(a), shall be considered a final decision of the FAB
 26 on the one-year anniversary of such date." 20 C.F.R. § 30.316(c). Therefore, Ms.
 27 Harger's EEOICPA claim will once again become final one year from the
 28 Director's decision on November 9, 2006.

logical conclusion before stepping in with its own analysis of the agencies' procedures. The claims of all Plaintiffs whose claims are reopened by the Director for reconsideration are therefore stayed. Nevertheless, considering defense counsel's representation concerning Ms. Alston, discovery may proceed regarding her claim. This should allay any concerns about undue delay on the part of all parties because the additional Plaintiffs were joined in this case due to common questions of law, and the discovery related to Ms. Alston's claims applies equally to the claims of the remaining Plaintiffs. The remaining Plaintiffs, and all Plaintiffs who subsequently may be joined into this case and who are represented by Mr. Foulds, shall be bound by this discovery. Accordingly, Defendants' Motion to Dismiss is denied, but the claims of Ms. Harger and other Plaintiffs whose final decisions have been reopened in the Director's discretion are stayed until the earlier of DOL's completion of reconsideration and another denial of coverage, or a year from the Director's decision to reopen the decision.

b. FOIA Claims

Defendants state that Ms. Harger has not identified any specific FOIA requests properly made by her that have not been answered. Therefore, they ask the Court to dismiss her request for enforcement under FOIA pursuant to Federal Rules of Civil Procedure 8(a) and 41(b). Additionally, Defendants have located two requests to their agencies from Plaintiff's counsel, but they assert and provide documentation that shows those requests either have been answered or were not properly made on behalf of Ms. Harger or anyone other than Mr. Foulds. At the hearing, Mr. Foulds stated he would attempt to gather the documents requested through the discovery process. Therefore, Plaintiffs' FOIA claims are dismissed at this time.

c. 12(b)(6) Motion to Dismiss NIOSH as Defendant

Defendants lastly make an argument under Rule 12(b)(6) that the Court should dismiss NIOSH as a Defendant because DOL is responsible for claims

**ORDER GRANTING MOTIONS FOR JOINDER, DENYING IN PART,
GRANTING IN PART DEFENDANTS' MOTION TO DISMISS * 8**

1 adjudication under the EEOICPA. The respective roles of DOL and NIOSH, a
2 branch of the Department of Health and Human Services, in dose reconstruction
3 and determination of eligibility for benefits under the EEOICPA is not absolutely
4 clear to the Court at this time. Therefore, it deems dismissal of NIOSH premature
5 and denies the Government's motion to dismiss it as a Defendant.

6 Accordingly, **IT IS HEREBY ORDERED:**

7 1. Plaintiffs' Motions for Joinder (Ct. Rec. 39 & 44) are **GRANTED**.

8 2. Defendants' Motion to Dismiss (Ct. Rec. 21) is **DENIED in part**,

9 **GRANTED in part**.

10 3. The claims of Plaintiff Opal Harger and other Plaintiffs whose final
11 decisions denying them EEOICPA benefits have been administratively reopened
12 by the Director are **stayed** pending further notice from the parties.

13 **IT IS SO ORDERED.** The District Court Executive is directed to enter
14 this Order and to provide copies to counsel.

15 **DATED** the 14th day of May, 2007.

16 *s/ Robert H. Whaley*

17 ROBERT H. WHALEY
18 Chief United States District Judge

19 Q:\CIVIL\2006\Harger\dismiss.ord.wpd

20
21
22
23
24
25
26
27
28
**ORDER GRANTING MOTIONS FOR JOINDER, DENYING IN PART,
GRANTING IN PART DEFENDANTS' MOTION TO DISMISS * 9**